

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



76-5012

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

----- -x  
IN RE: ORE CARGO, INC., :

Bankrupt :

ISRAEL DISCOUNT BANK LIMITED, :

Plaintiff-Appellant :

-v- :

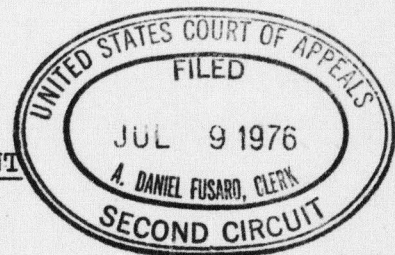
JACOB GOTTESMAN, Trustee in  
Bankruptcy of Ore Cargo, Inc. :

Defendant-Appellee, :

----- -x

On Appeal from the United States District Court,  
For the Southern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT



J. Lester Parsons, III, Esq.  
Stephen P. Kyne, Esq.,  
Of Counsel

BURKE & PARSONS  
52 WALL STREET  
NEW YORK, N. Y. 10005

Attorneys for Plaintiff-Appellant

*Recd Copy*  
*7/9/76*  
*@ 10:30 pm*  
*Quernan*  
*Att. S. Kyne*  
*Gabor*  
*Forney*  
*Indel*



UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

----- -X  
: IN RE: ORE CARGO, INC., :  
: Bankrupt :  
: ISRAEL DISCOUNT BANK LIMITED, :  
: Plaintiff-Appellant :  
: Docket No. 76-5012  
: -v- :  
: JACOB GOTTESMAN, Trustee in :  
: Bankruptcy of Ore Cargo, Inc. :  
: Defendant-Appellee. :  
----- -X

REPLY BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This brief is submitted by Israel Discount Bank Limited, (the "bank"), plaintiff-appellant herein, in reply to the brief of Jacob Gottesman, as trustee in bankruptcy of Ore Cargo, Inc. (the "trustee") defendant-appellee herein.



ARGUMENT

THE BANK DID NOT AND DOES NOT  
CONCEDE WHAT THE TRUSTEE CLAIMS IT DOES.

In his brief, the trustee says that in the Bankruptcy Court the Bank "conceded that a tort claim and the proceeds thereof cannot be subject to a security interest obtained and perfected under the Uniform Commercial Code, (See Paragraph 10 of reply affidavit of Michael Wexelbaum, sworn to on March 12, 1975, where reference is made to [the bank's] memorandum of law submitted to the Bankruptcy Court, and p. 16 of transcript of oral argument held on March 14, 1975 [Appendix, p. 21])." Brief of Defendant-Appellee, p. 6.

The relevant pages of the bank's memorandum before the Bankruptcy Court (pages 5 and 6 thereof; see paragraph 10 of Mr. Wexelbaum's affidavit) are included as an Exhibit hereto. The bank submits that the concession contained therein was no more and no less than it has conceded herein - the tort claim proceeds at issue herein are excluded from Article 9 of the Uniform Commercial Code by Section 9-104(k). Whether tort claims and their proceeds



may be the subject of a security interest created by an agreement couched in the language of the Uniform Commercial Code and as to which a filing statement was filed for the purpose of perfecting security interests in other property described therein is, of course, the point at issue herein.

The trustee refers to p. 16 of the transcript, [Appendix, p. 21] as containing some concession. As appears from the transcript, counsel for the bank agreed to the Court's Statement "tort claims are excepted from the operation of the U.C.C." This again was no more than a concession that Section 9-104(k) excepts such claims. The following page of the transcript [Appendix, p. 22] shows that neither the Court nor counsel understood counsel's statement to imply agreement with the Court's earlier suggestion that the conduct of the bank in filing under the Code showed an intention to waive rights to tort claims.

Respectfully submitted,

BURKE & PARSONS  
Attorneys for Appellant  
ISRAEL DISCOUNT BANK LIMITED  
52 Wall Street  
New York, NY 10005

Stephen P. Kyne, Esq.  
J. Lester Parsons, III, Esq.  
Of Counsel



about who paid the claim or why; if the JOHN CROSBY's own insurers paid it, it would seem to be a contract claim on an insurance policy just as if the insurers had paid for a loss caused by fire, perils of the seas, or other non-tortious cause. Nothing in the complaint or other papers herein says that the bankrupt's claim for its damages was against the HASLACH or anyone else but its own insurers, and the Court should not so presume without any evidence on the point. If the claim was against the JOHN CROSBY's insurers, it was not a tort claim, the Uniform Commercial Code applies, and, given the concession for the purposes of this motion (contained in Mr. Wexelbaum's affidavit at paragraph 22), that the security interest was duly filed, the motion must be denied.

The balance of this argument supposes that the defendant will present evidence to this Court that the HASLACH collision claim was a tort claim against the HASLACH, rather than an indemnity claim against the JOHN CROSBY's own insurers. If the defendant presents such evidence, it must be conceded that Article 9 of the Uniform Commercial Code does not strictly apply, due to Section 9-104(k) quoted by Mr. Wexelbaum. However, it does not follow



that IDB obtained no security interest in this collision claim, even if it was a tort claim. It is obvious from U.C.C. Sec. 9-104, and the Official Comment thereto, that the section does not purport to say there can be no such thing as a security interest, or no valid security interest, except within the scope of Article 9. Section 9-104(a) identifies preferred ship mortgages under the Ship Mortgage Act as security interests, although they are excluded from Article 9, and the Official Comment makes clear that the purpose of the exclusions was not to deny the possibility of creating security interests in excluded cases but simply to leave it to other applicable law to regulate the rights of parties to those types of transactions that are excluded. The Official Comment cites a variety of reasons for exclusion, such as governance by federal statute (Sec. 9-104(a)), variable local practices far removed from ordinary commercial financing (Sec. 9-104 (c) and (d)) and adequate coverage by existing law (Sec. 9-104(c), (g) and that part of (k) not here involved). The comment relevant to the exclusion of tort claims reads as follows:



